United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1045

To be argued by
LAWRENCE S. FELD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1045

ESTYNE WEST,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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Of Counsel.

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Preliminary Statement

Estyne West appeals from an order entered December 5, 1973, in the United States District Court for the Southern District of New York by the Honorable Marvin E. Frankel, United States District Judge, denying without a hearing appellant's motion, pursuant to Title 28, United States Code, Section 2255, to vacate her judgment of conviction and sentence on Indictment 72 Cr. 479.

Indictment 72 Cr. 479, filed April 21, 1972, charged Estyne West with possessing 11.9 grams of cocaine with intent to distribute, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). After a four day trial before Judge Frankel and a jury, West was found guilty on November 2, 1972. On April 4, 1973 West was sentenced to a one year term of imprisonment with a term of special parole of three years to follow. The conviction was affirmed from the bench by this Court on June 27,

1973. 480 F.2d 916. On October 23, 1973 the United States Supreme Court denied West's petition for a writ of certiorari. 42 U.S.L.W. 3246.

On November 16, 1973, the day West surrendered to begin serving her sentence, she filed the instant motion pursuant to Section 2255. Following the denial of this motion on December 5, 1973, appellant moved in the District Court for release on her own recognizance or for bail pending appeal. This application was denied on December 21, 1973. Thereafter, she moved in this Court for the same relief, which was denied on January 29, 1974.

Statement of Facts

The Government's Case

On March 6, 1972, at approximately 8:00 P.M., agents of the Bureau of Narcotics and Dangerous Drugs went to West's residence, Apartment E2E, 425 East 63rd Street, New York, New York, to execute a narcotics search warrant (Tr. 25, 31, 233).* Several agents positioned themselves in a stairwell landing near West's apartment, while others stood outside the building (Tr. 26).

Special Agent Jeffrey Hall, who was stationed inside the building, overheard West and a man conversing within the apartment. The word "cocaine" was mentioned several times by both of them (Tr. 29). No electronic eavesdropping equipment was used. The agents waited for approximately 5½ hours in the hope that they could avoid a forced entry by entering the apartment at the same time that the man departed. When this did not happen, two of the agents obtained a ladder which was placed outside of the building beneath the dining room window of West's apartment (Tr. 157-157A).

At approximately 1:35 A.M. on March 7, 1972, Special Agents Gregory Korniloff and Edward Magno, at a pre-

* References to the trial record are referred to herein as "Tr."

arranged signal, climbed up the ladder (Tr. 158, 201-202). Agent Korniloff entered West's apartment through the dining room window. Inside the apartment he observed West and an individual named Sheldon Bloom * in the living room. West ran to the living room window with a transparent object cupped in her hands, threw the object out of the window, turned and said to Bloom, "They can't do anything now" (Tr. 159-160). The glass object thrown by West shattered upon hitting the pavement; inside was a small plastic bag containing 11.9 grams of cocaine (Tr. 122; GX 4-C).

After Agent Magno climbed the ladder and entered the apartment through the window, he placed West and Bloom under arrest. Hall and other agents were admitted to the apartment, which was then searched. During the search, West produced two bags of benzocaine (GX 1-C, 1-D), which she later admitted were "cutting materials" (Tr. 75). The search disclosed additional quantities of benzocaine in the apartment.

West and Bloom were transported to the New York Regional Office of the Bureau of Narcotics and Dangerous Drugs, where West admitted to Agent Hall that she had thrown her cocaine out of the window (Tr. 67). She further stated that it was pure cocaine ** and that the chemist would not believe it when he analyzed it (Tr. 67). West also told Agent Hall that she could help the Bureau of Narcotics and Dangerous Drugs apprehend dope peddlers with much larger quantities of drugs than the agents had obtained from her (Tr. 69).

When West was subsequently interviewed by Assistant United States Attorney Walter J. Higgins, she denied using drugs of any kind, including cocaine (Tr. 70).

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* Bloom died on March 23, 1972 (Tr. 72).

** The 11.9 grams of cocaine had a purity of 94.93% (GX 5).

Agent Hall testified that approximately two or three weeks before the trial, West telephoned him and stated that Bloom had thrown the bag of cocaine out of the window (Tr. 82-83). When he remarked that this new assertion was very convenient since Bloom was dead and could not be a witness, she replied, "Yes, very convenient" (Tr. 83-84).

The Defense Case

Joel West, appellant's former husband, who at the time of West's trial was serving a prison sentence for possession of a forged instrument, testified that the benzocaine found in the apartment belonged to him (Tr. 253, 257). He claimed that he had been using this benzocaine in certain experiments which he had conducted in the apartment kitchen and that through these experiments he had developed a process for the quantitative and qualitative analysis of cocaine which the Bureau of Narcotics and Dangerous Drugs was using (Tr. 256-258, 260, 288-289). He further testified that he had acquired a knowledge of cocaine and offered the opinion that pure cocaine could not be "cut" *i.e.,* diluted more than twice (Tr. 262-264).*

Joel West admitted that at the time of appellant's arrest, he had been a patient at Bellevue Hospital, having been sent there for observation because of a "breakdown" (Tr. 289-90).

Estyne West took the stand and on direct and cross-examination testified extensively about her background education, professional careers, and business interests (Tr. 302-313, 331-335). On direct examination she stated that Bloom had been at her apartment to discuss her proposal that he invest in an African opera company in

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* Agent Hall had testified that cocaine with a purity of 94% could be diluted at least three times (Tr. 81). If diluted three times and sold in gram quantities, 11.9 grams of 94% pure cocaine would have a retail value of $2,000 (Tr. 81).

which she and her husband had an interest and that none of their conversation was about cocaine, which she said was never mentioned at any time (Tr. 310, 313-315). She denied throwing GX 4-C out of the window and denied making any admissions to Agent Hall (Tr. 322-23).*

The Government's Rebuttal Case

Agent Hall testified in rebuttal that during his conversation with West at the Bureau of Narcotics and Dangerous Drugs Regional Office, following her arrest, she stated to him that the primary purpose of her meeting with Bloom on March 6, 1972, was connected with a swindle which she had perpetrated on Bloom and his partner (Tr. 351). West stated that she had induced Bloom and his partner to give her $10,000 for the purpose of purchasing cocaine in South America (Tr. 351). She told Hall that she had met with Bloom's partner and the latter's lover in the Bahamas, where they had helped tape sugar (which they believed was cocaine) to her body for smuggling into the United States (Tr. 353). Bloom was at her apartment that night because she was attempting to obtain more money from him; she had told Bloom that evening that the alleged cocaine was secreted elsewhere (Tr. 353). Furthermore, she told Hall that she believed the agents were at the apartment that night to seize this alleged cocaine (Tr. 354).

ARGUMENT

The District Court correctly denied appellant's motion under Section 2255.

Appellant contends that during her trial Judge Frankel erred in admitting testimony by Special Agent Jeffery Hall

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* She charged that Hall had indicated to her that he had fabricated her admission (Tr. 323-324).

concerning parts of the conversation between West and Bloom which he overheard while waiting outside the door of West's apartment to execute a search warrant for narcotics therein on March 6, 1972. Although Hall overheard the conversation through the door without the aid of any electronic eavesdropping equipment, appellant claims that her right of privacy under the Fourth Amendment nevertheless was unconstitutionally invaded and that Hall's direct testimony concerning what he heard, appellant's testimony relating to that conversation and Hall's rebuttal testimony should have been excluded. West further maintains that the failure of her trial counsel to object to Hall's testimony concerning the overheard conversation amounted to a deprivation of her right to the effective assistance of counsel under the Sixth Amendment. The District Court properly concluded, however, that these claims lacked merit:

> "Counsel for the movant renews the attack on trial counsel's 'adequacy,' a line also taken by present counsel's predecessor who succeeded the trial attorney. The point thought to have been so clear, however, as to make its neglect a demonstration of incompetence was not mentioned on the appeal. And yet, as shown by the affidavit of counsel who took the Appeal and now urges relief under Section 2255, the supposed ground of relief rests exclusively upon the trial record."
>
> "It suffices to say that the contention so tardily raised lacks merit. This motion is denied."
>
> "So ordered."

Relying on *Kaufman* v. *United States,* 394 U.S. 217 (1969), West argues that the claim raised now should be entertained on collateral attack on her conviction under Section 2255 of Title 28, United States Code. The argument is without merit.

No objection was made at trial by Ms. Enid Gerling, West's trial counsel, to Hall's testimony concerning the overheard conversation. Nor was this alleged claim of error referred to in the lengthy post-trial motion papers filed by Sanford Katz, Esq. on West's behalf for a judgment of acquittal, or, in the alternative, for a new trial. Furthermore, it was not asserted on petitioner's direct appeal to this Court, in which she was represented by the same attorney, Paul P. Rao, Jr., Esq., who later filed the Section 2255 motion and who represents her on this appeal. The first time the issue appears to have been raised was in West's petition to the United States Supreme Court for a writ of certiorari, filed on July 26, 1973 (see 42 U.S.L.W. 3154), which was denied on October 23, 1973 (42 U.S.L.W. 3246).*

Under these circumstances, West's reliance on *Kaufman* is completely misplaced. First, considerable doubt exists about the continuing vitality of *Kaufman's* holding that, in the absence of a deliberate by-pass of orderly procedures (of which more, *infra*), Fourth Amendment claims are cognizable on collateral attack. A majority of the present

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* The petition for certiorari is summarized in United States Law Week as follows:

"Ruling below (CA 2, 6/27/73) "

"Federal narcotics conviction is affirmed without opinion."

"Questions presented: (1) Did federal narcotics agent's false identification of bag of white powder as cocaine prejudice irreparably defendant's right to fair trial? (2) Did trial court err to defendant's prejudice in permitting, over objection, development of testimony that was allegedly inflammatory, extremely prejudicial, and unrestrained in its characterization of individuals? (3) *Was defendant's right to privacy violated by an agent's overhearing, through closed apartment door, of conversations held inside?*"

"Petition for certiorari filed 7/26/73 by Paul P. Rao, Jr., of New York, New York."

"No. 73-179. West v. U.S."

(emphasis added; 42 U.S.L.W. 3154).

Justices of the United States Supreme Court have rejected the *Kaufman* rule, either in dissent in that case, 394 U.S. at 242 (Dissenting Opinion of Mr. Justice Harlan, joined by Mr. Justice Stewart), or since. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 249 (Concurring Opinion of Mr. Justice Blackmun), 250 (Concurring Opinion of Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist) (1973). The record in this case establishes the toxic effect on the prompt and proper disposition of criminal cases which *Kaufman* may, in some instances, encourage by permitting the interminable litigation of Fourth Amendment claims on collateral attack.

Second, even under *Kaufman,* West is foreclosed from raising on collateral attack the Fourth Amendment claim she now asserts. *Kaufman* v. *United States, supra,* 394 U.S. at 227 n. 8; *Henry* v. *Mississippi,* 379 U.S. 443, 451-452 (1965); *Johnson* v. *United States,* 318 U.S. 189, 200-201 (1943); *Williams* v. *United States,* 463 F.2d 1183, 1184 (2d Cir.), *cert. denied,* 409 U.S. 967 (1972); *Terry* v. *Peyton,* 433 F.2d 1016, 1020-1021 (4th Cir. 1970); see also *Davis* v. *United States,* 411 U.S. 233, 239-242 (1973). The record in this case indisputably establishes that West waived the alleged claims of error asserted here by failing to object to the challenged evidence at trial and by failing to raise the issues in the post-trial proceedings and on her direct appeal to this Court.

West's claim rests exclusively on the trial record. Having been represented by three different retained attorneys at trial, in the post-trial proceedings and on appeal to this Court, all of whom were fully familiar with the record, West chose not to assert her Fourth Amendment claim until she filed her petition for a writ of certiorari. The Section 2255 motion did not even attempt to offer any justification for West's failure to raise this alleged error on her direct appeal to this Court. Nor did it mention that the very same issue had been presented in West's petition for a writ of cer-

tiorari. Furthermore, the attack on the competence of West's trial counsel had previously been made in the post-trial proceedings, had been rejected by the District Court, and had not been renewed in this Court on direct appeal. West's argument, made for the first time in this Court, that her Fourth Amendment claim was not "known" to the attorneys who represented her at trial and in the post-trial proceedings is without support in the record, as is her further conjecture that their failure to raise the issue was "if anything . . . an 'honest mistake'" (Brief at 22).* Furthermore, West fails to cite any authority supporting her argument that under the circumstances of this case there was no waiver. Where, as here, no objection is made at trial, the claimed error is not asserted in the defendant's post-trial motions and also is not raised on the appeal from the judgment of conviction, "[t]he only conclusion that can be drawn . . . is that there was a deliberate by-passing of the orderly federal procedures provided at or before trial and by way of appeal." *Williams* v. *United States, supra,* 463 F.2d at 1184; *Kaufman* v. *United States, supra,* 394 U.S. at 220 n. 3.

West attempts to excuse her failure to raise the claims presented here on her direct appeal on the theory that "having not been raised below, the constitutional issues were not preserved, and thus the proper procedure was it should not have been raised directly on appeal but collaterally by way of a motion under 28 U.S.C. § 2255" (Brief at 22). This argument has no merit whatsoever. First, even though no objection had been made at trial, the plain error doctrine surely would have permitted discretionary appellate review of West's Fourth and Sixth Amendment claims. *United States* v. *Indiviglio,* 352 F.2d 276, 280-281 (2d Cir. 1965)

* It is equally possible and indeed far more likely, considering that both attorneys who represented West were able and experienced criminal lawyers, that "counsel did not believe that the circumstances in this case were even arguably close" to an infringement of West's Fourth Amendment rights. *Williams* v. *United States, supra,* 463 F.2d at 1185.

(*en banc*), *cert. denied*, 383 U.S. 907 (1966). Second, West's argument ignores the fact the Fourth Amendment claim was nonetheless presented in her petition for certiorari to the Supreme Court. Indeed the very fact that the point was presented in that petition is affirmative evidence of a knowing and deliberate by-pass of the appeal procedure insofar as her direct appeal to this Court is concerned.

Wholly apart from the matter of waiver, there is no merit to the claim that Hall's testimony about the overheard conversation was inadmissible. Hall and the other agents with him on the night of March 6, 1972 went to appellant's apartment for the purpose of executing a search warrant for narcotics. Hall listened at the door to determine who was inside and whether a forced entry could be avoided. In the course of doing so, he heard the word "cocaine" mentioned by both West and Bloom. No electronic eavesdropping device was used. The listening was thus clearly designed to serve the judicially authorized purpose for which Hall and the other agents were present and the parts of the conversation overheard related directly to the subject matter of their mission. These reasons alone are sufficient to warrant the conclusion that no Fourth Amendment violation occurred.

Furthermore, as this Court stated in *United States* v. *Ortega*, 471 F.2d 1350, 1361 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973): "What can be heard by the naked ear is not protected by the Fourth Amendment." Under the circumstances, the listening at West's door did not transgress her right of privacy. See *United States* v. *Wilkes*, 451 F.2d 938, 941 n. 6 (2d Cir. 1971); *United States* v. *Llanes*, 398 F.2d 880, 883-884 (2d Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969).

In view of the foregoing, it is unnecessary to consider West's frivolous claim that she received constitutionally deficient legal representation at her trial because her attorney did not object to Hall's testimony relating to the overheard conversation.

CONCLUSION

The order of the District Court denying the motion without a hearing should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

LAWRENCE S. FELD,
JOHN D. GORDAN III,
Assistant United States Attorneys,
Of Counsel.

Form 280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LAWRENCE S. FELD being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 21st day of FEBRUARY, 1974 he served ~~a copy~~ 2 copies of the within BRIEF by placing the same in a properly postpaid franked envelope addressed:

PAUL P. RAO, JR., ESQ.
233 BROADWAY
NEW YORK, NEW YORK 10007

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Lawrence S. Feld

Sworn to before me this
21st day of FEBRUARY, 1974

SETH ANDREW SCHAFFER
Notary Public, State of New York
No. 31-7745
Qualified in New York County
Commission Expires March 30, 1975

Seth Andrew Schaffer